IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 250 OF 2011

CHARLES NDERITU WANJOHI.....1ST PLAINTIFF

JOSEPH MARO KARIUKI.....2ND PLAINTIFF

STEPHEN WAWERU KIBERI.....3RD PLAINTIFF

JOHN KIRIGU MWAURA.....4TH PLAINTIFF

PATRICK MBUGUA MWAURA.....5TH PLAINTIFF

VERSUS

LAWRENCE MAINA MWANGI.....1ST DEFENDANT

MILLING CORPORATION OF (K) 2009 LTD.....2ND DEFENDANT

RULING

The plaintiffs/applicants filed the Notice of Motion dated 10/9/2011 seeking an order of temporary injunction to issue against the defendants jointly and severally to restrain them from transferring, selling, occupying, developing or doing anything whatsoever on plots No.2, 3, 7, 10, 11, 14, 8, 9, 12 & 13 all comprising Nakuru Municipality Block 8/44 also previously known as Nakuru Municipality LR 12/2181, pending the hearing and determination of this suit and that the OCS Nakuru Central Police to ensure compliance. The applicants' case is that under various sale agreements between each of the applicants and the 1st defendant/respondent, the listed plots were sold to the applicants (CNW1(a). They performed their part of the contract and waited for the transfer of the plots to themselves only to learn that the plots had been transferred to the 2nd Defendant; that the 1st respondent is now trying to refund the sale prices to the applicants (CNW7). The application is supported by the affidavit of Charles Nderitu dated 10/9/2011, further affidavit dated 31/10/2011, and annextures thereto. The applicants discovered that the 1st respondent had given the property to agents to advertise for sale (CNW5) and the 2nd respondent has already paid the stamp duty in respect of the land, has now moved and taken possession of the land and the respondents' actions have prejudiced the applicants' rights to the land. The applicants also exhibited cheques which the 1st defendant has written to them purporting to rescind the contracts. The plaintiffs have also averred that there is now judgment on record against the 1st defendant, having failed to enter appearance. Despite the fact that the 1st respondent was made aware of it, he has continued acts of breach of the contracts.

In opposing the application, the 1st defendant through the firm of B. Mathenge & co. Advocates, filed

grounds of opposition. Mr. Karanja, counsel for the 1st defendant argued that the fact that there is interlocutory judgment against the 1st defendant does not mean that a prima facie case has been made out. He submitted that the documents relied upon by the applicants are inadmissible as they are not stamped in accordance with **Stamp Duty Act**; that the agreements are in respect of LR 12/8121 and that there is no evidence that 12/2181 is the same as 8/44; that the search certificate shows that land was registered on 16/9/02 and sale agreements are for 2005-06 and there could not have been Block 12 in 2006 and therefore the documents refer to another piece of land elsewhere. It was counsel's submission that the plaintiffs have to prove the nexus between Block 8/44 and Block 12/2181; that in any event the agreements contains a clause that in the event of breach, 10% of the sale price be paid. Counsel also observed that the applicants had not paid the full sale price in any event and that the applicants can be paid damages in terms of the default clause.

Mr. Kahiga who appeared on behalf of the 2nd defendant associated himself with Mr. Karanja's submissions and urged the court to dismiss the suit against the 2nd defendant as he was not party to the agreement and the court cannot be used to rewrite the agreement on behalf of the parties.

At this stage, the only issue for consideration is whether the applicants meet the conditions for grant of interlocutory injunction in terms of the case of **Giella V Cassman Brown Co. Ltd (1973) EA 358,** which are that; the plaintiff has to demonstrate that he has a prima facie case with a probability of success; that if the order of injunction is not granted, the applicants are likely to suffer irreparable loss which cannot be adequately compensated in damages and lastly, if the court is in doubt, it should decide the application on a balance of convenience.

In the instant case, the applicants claim to have entered into an agreement with the 1st defendant for sale of plots 2, 3, 7, 10, 11, 14, 8, 9, 12 & 13. They describe these plots as having been part of Plot 12/2181 or 8/44. I have seen the sale agreements that were exhibited. The sale agreement between Charles Nderitu and the 1st defendant was in respect of Plot 8/44 made on 28/3/06, Joseph Maro the agreement was in respect of plot 12/2181, on 28/1/05, Stephen Waweru's agreement with defendant was in respect of plot 12/2181.

Patrick Mbugua entered an agreement with defendant in respect of Plot 12/2181, John Kirigu Mwaura is also 12/2181. Though the plaintiffs allege that plot 12/2181 and 8/44 is one and the same plot, there is no evidence that they are one and the same plot. The agreement between the 1st defendant and the 2nd defendant is in respect of plot 8/44 and so is that of the 1st defendant, Charles Ndiritu. The applicant exhibited a search certificate which indicates that the 1st defendant was issued with a certificate of lease on 8/44 since 16/9/02 (CNW4) and the certificate of titles was issued then but the copy of certificate of lease exhibited in the list of documents show the lease to have commenced on 20/9/05 (list of documents filed by Mirugi Kariuki Advocates).

The contracts between the plaintiffs took place in 2005 and 2006. The copies of the contracts entered into between the applicants and 1st defendant show the sums paid at the time and there were balances. There is no evidence that the balances were paid by any of the applicants nor have the applicants demonstrated that they paid registration fees, stamp duty and title deed fee in terms of paragraph 7 of the agreement. Had they complied, their actions would have been receipted.

I find that the applicants have not demonstrated that they have a prima facie case with good chances of success.

In paragraph 8 of the agreement, it was agreed that in the event of breach, the party in breach of the agreement would pay the other party 10% of the purchase price, as general damages. The applicants have told the court that the defendant has given them cheques as refund. The court has not been told whether the applicants ever took possession of the plots since 2006 because it seems the 2nd defendant found the place unoccupied and has taken possession. Because of clause 8 of the agreement, the plaintiffs have not demonstrated that they will suffer irreparably if an order of injunction is not granted.

From the foregoing, I find that the applicants have failed to meet the threshold for the grant of an interlocutory injunction to the required standard and I dismiss the application. Costs to be in the cause.

DATED and DELIVERED this 28th day of March, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Mwangi for the plaintiffs

N/A for the defendants

Kennedy – Court Clerk